(13)

Office - Supreme Court, U. S.
FILED
MAR 11 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

F. GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

F. GERALD THOMAS,

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING, AND RELATED MOTION.

LLOYD C. WHITMAN,
Attorney for F. Gerald Thomas, Petitioner.

Midwest Law Printing Company
340 West Huron Street
Chicago, Illinois

INDEX.

PAGE

Denial of writ of certiorari in case No. 1041, October Term, 1940, no obstacle to grant of writs herein..... 2

Prior decisions of the Circuit Court of Appeals do not now, in this Honorable Court, constitute law of the case 3

Preservation of Certain Issues 3

If Ever Effective, Injunction Expired June 22, 1938. —Illustrated by CCA Stays of Mandate Pending Petitions for Rehearing 3

Freedom of Speech 4

(1) Injunction still-born,—void *ab initio* 4

(2) Restraint of freedom of speech by injunction against future communications peculiarly the child and tool of the bankruptcy courts..... 4

(3) Based on acts not interfering with the jurisdiction of the court, injunction and commitment violate the right of free speech..... 5

(4) If by labored and forced construction held to refer and apply to communications betweeen stockholders not within the District Court's jurisdiction, so construed the injunction violates the right of free speech..... 5-6

(5) Vital Importance of Freedom of Speech..... 6

Vital Importance of Further Jurisdictional Questions, —of special, nation-wide concern herein in that the misclaimed jurisdiction is utilized to deny petitioner and associates freedom of speech..... 6

Prejudicial Inconsistencies and Unwarranted Findings and Statements of the Lower Courts..... 7

(1) The highly prejudicial CCA statement that petitioner's aim was to compel the trustees to enter into a lease for which petitioner would obtain a commission is untrue..... 7

(2) The prejudicial CCA statement that it found "ample evidence in the record" to sustain the charge by respondents that petitioner obtained his powers of attorney by "misrepresentation" is untrue 8

(3) The CCA statement that by the District Court's decretal order of August 6, 1940, the injunction of May 26, 1938, was "continued in effect," is untrue 8

(4) The CCA finding that petitioner was not coerced to consent to being enjoined pending the anticipated possible appeal is untrue..... 8-9

(5) The CCA holding on the second appeal (in flat contradiction of the holding on the first appeal) that to determine the nature, force and effect of the injunction resort may not be had to the record *aliunde* the face of the injunction itself, was essential to the affirmance on the second appeal, is unfounded in law and no authority for the holding then or for ignoring in its last decision the record *aliunde* the face of the order has ever been cited by court or counsel in the whole course of this litigation..... 9

(6) Equally essential to petitioner's undoing, in support of the erroneous ruling that dissolution of a temporary injunction was "within the discretion of the District Court" unless otherwise provided on the face of the order has never been supported by court or counsel in the whole course of this litigation by supposed authority 9-10

Jurisdiction of the Bankruptcy Courts under Section 207, Par. (f) 10

(1) Question of consistency of "reservations" a mere stop-gap 10

(2) Possible powers of bankruptcy courts under Section 207, paragraph (f) of like ilk..... 2

(3) CCA driven to read paragraph (h) of Section 207 as though reading "to operate * * * the property dealt with by the plan"!—And expressly rests its decision on this revolutionary construction of paragraph (h)..... 3

Certificate of Counsel 13

Affidavit of petitioner 13

Appendix, petitioner's letter of April 27, 1938.....15-18

TABLE OF CASES.

Atlantic Coast Line v. Powe, 283 U. S. 401 2

Bridges v. State of California, 314 U. S. 252 5

Case v. Los Angeles Lumber Products Co., 307 U. S. 619 4

Chicot-County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 6

In re 4145 Broadway Hotel Company, 100 Fed. 2nd. 7 ..... 3, 9, 11

In re 4145 Broadway Hotel Company, 117 Fed. 2nd. 639 ..... 7, 8, 9

In re 4145 Broadway Hotel Company, 130 Fed. 2nd. 497 9

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287 4

Near v. Minnesota, ex rel. Olsen, 283 U. S. 697, 75 L. ed. 1357 4

Palko v. Connecticut, 302 U. S. 319, 86 L. ed. 192 ..... 5, 6

Schneider v. New Jersey, 308 U. S. 147 6

Sweeney v. Hanley, 126 Fed. 97 10

Twining v. New Jersey, 211 U. S. 78 6

White v. Higgins, 116 Fed. 2nd. 312 3

Section 207.11 U. S. C. A., Par. (f) 10, 11

U. S. et al. v. Corrick et al., 298 U. S. 435, 437-438, 8 L. ed. 1263, 1266 11

Constitution of the United States, First and Fourteenth Amendments 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

F. GERALD THOMAS, (C.C.A. Case No. 7888)

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

F. GERALD THOMAS, (C.C.A. Case No. 7891)

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING, AND RELATED MOTION.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now petitioner, F. Gerald Thomas, personally and by Lloyd C. Whitman, his attorney, and moves the Court to vacate and set aside its orders herein of February 15, 1943, and reconsider the petition herein for writs of certiorari; and that the Court herein order, in effect but in such terms as may please the Court, that until otherwise ordered by this Court your petitioner and all other stockholders of 4145 Broadway Hotel Company, may communicate with one another and freely participate to the full of their rights and privileges under the terms of the reorganization trust agreement herein in the referendum as of May 1, 1943, instituted by the respondent trustees herein February 26, 1943, and now going on under said trust agreement, as shown by affidavit of F. Gerald Thomas duly filed herein [attached hereto], without limitation or restraint by or under the terms of provisions of the injunction herein entered May 26, 1938, or of any other findings, orders or decrees herein of the District Court, and without prejudice to claim of petitioner or any other stockholder that said trust was terminated in 1939, or that said trustees were removed in 1940.

And in support of the foregoing motions your petitioner respectfully represents:

Prior Denial of Certiorari. Denial of writ of certiorari to petitioner in case No. 1041, October Term, 1940, is no obstacle to granting writs herein although some of the questions herein raised were sought to be raised in case No. 1041. *Atlantic Coast Line* v. *Powe*, 283 U. S. 401, 403-404.

Prior Decisions herein of CCA. Decisions of the Circuit Court of Appeals prior to its orders of July 18, 1942 (R. 72), reversal of which is now sought, do not now, in this Honorable Court, constitute law of the case on the instant application. *White* v. *Higgins,* 116 Fed. 2nd. 312, 317.

Preservation of Certain Issues. In the instant case your petitioner anew moved the trial court to vacate or otherwise hold for nought the injunction of May 26, 1938; and moved the court to vacate the decretal order of August 6, 1940, as a whole and piece by piece (Our Reply Brief, 4-5).

If Ever Effective, Injunction Expired June 22, 1938. In its first decision (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7) the Circuit Court of Appeals **demonstrated from the incontrovertible record to like effect** (Proceedings of May 23, 1938, Appendix, Our Orig. Br. 73-79) that the injunction of May 26, 1938 (Trans. 7497, pp. 10-11) was merely to preserve the *status quo* of the Thomas proceedings pending possible appeal by him from the order of May 23, 1938.

February 16, 1943, in its cases Nos. 7888 and 7891, the Circuit Court of Appeals ordered

> "Mandate stayed further **until Supreme Court disposes of petitions for rehearing** on order denying certiorari."

If no petition for rehearing were filed in this Honorable Court within 25 days of this Court's denial of certiorari herein, **would these stay orders of February 16, 1943, remain in effect until expressly vacated or declared for nought by orders of the Circuit Court of Appeals?**

May 26, 1938, the District Court enjoined petitioner from communicating with his associates or using his powers of

attorney **pending appeal from the order of May 23, 1938** (Our Orig. Br. 45). Legal possibility of appeal from that order expired at midnight, June 22, 1938, without appeal having been taken. **Did the injunction nevertheless remain in effect until expressly vacated or declared for nought by order of the District Court?**

Freedom of Speech.

(1) But the injunction of May 26, 1938, was still-born,—was void *ab initio*.

When the injunction was entered in 1938, the District Court could not enjoin what was not in contemplation until 1939, 1940 and 1941,—certainly could not enjoin participation in the referendum (now going on) as of May 1, 1943. *Near* v. *Minnesota, ex rel. Olsen,* 283 U. S. 697, 75 L. ed. 1357, 1366-1367.

Even tho petitioner serve ninety days in the County Jail, he still remains muzzled,—**stands today and will remain through the coming tomorrows, prohibited from communicating with other stockholders in the affair of the referendum as of May 1, 1943, commenced by respondents since denial of certiorari herein, or in any other of the corporate affairs.**

Silence coerced by law (Our Orig. Br. 27-28, 35-36, 38) is the argument of force in its worst form. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287, 302, 308.

(2) As pointed out by the Chicago Civil Liberties Committee (Their Motion p. 3), restraint of freedom of speech directed by injunction against *future* communications is peculiarly the child and tool of the bankruptcy courts, and is based on theory contrary to *Case* v. *Los Angeles Lumber Products Co.,* 307 U. S. 619, 59 S. Ct. 1030.

(3) If the acts which are the bases of injunction and commitment do not constitute interference with the jurisdiction of the court, injunction and commitment violate the right of free speech. Constitution of the United States, First and Fourteenth Amendments. *Palko* v. *Connecticut*, 302 U. S. 319, 326-327. *Harry Bridges* v. *State of California*, 314 U. S. 252, 267, 86 L. ed. 192, 205-206.

(4) If valid at all, the injunction of May 26, 1938 (Trans. 7497, pp. 10-11) must be construed to refer only to matters within the jurisdiction of the District Court. Construed to refer and apply to communications between petitioner Thomas and other stockholders on matters not within the court's jurisdiction it violates the right of free speech.

As of May 1, 1937, and every two years thereafter, to and including May 1, 1943, the Trust Agreement requires the trustees to conduct referendums to determine whether the Trust Agreement shall terminate, the referendum to be conducted at a meeting or by mail (Trust Agreement, Art. VII, Sec. 1, Trans. 7497, pp. 146-147). Stockholders may vote in person or by attorney in fact appointed in writing (Trust Agreement, Art. VIII, Trans. 7497, p. 147). **Thus the right to terminate or continue the trust is vested in the stockholders, not in the court.** The injunction of May 26, 1938, was based solely on the facts that petitioner sent out his letter of April 27, 1938 (Trans. 6696, pp. 5-7; reprinted as Appendix hereto), not on the ground that any statement in that letter was untrue or uncalled for but that the letter did not refer to possible future action by stockholders under the trust agreement but to the pending motion of Thomas for leave to file his proposed second amended petition (Proceedings of May 23, 1938, Trans. 6696, p. 63, lines 9-18, p. 64, first four lines; Appendix Our

Orig. Br. 74, lines 2-12, p. 75, first seven lines; proceedings of June 22, 1938, Trans. 6696, pp. 69-70, last 4 lines, p. 71, lines 16-18 from bot.).

And the acts of petitioner which are the bases of committing him for contempt are letters of March 15, 1941, March 17, 1941, and April 5, 1941 (Trans. 7763, pp. 25, 27-31, 59-64), each and all of which relate solely to the referendum of May 1, 1941. That referendum under the reorganization Trust Agreement was not matter within the jurisdiction of the District Court but matter solely the affair of the stockholders. **As to that affair and as to the affair of the referendum as of May 1, 1943, now going on, your petitioner and the other stockholders have constitutional right freely to communicate with one another**

(5) Freedom of speech is of general and vital importance. It "lies at the foundation of free government by free men" (*Schneider* v. *New Jersey,* 308 U. S. 147, 161), "A fundamental principle of * * * justice" (*Twining* v. *New Jersey,* 211 U. S. 78, 106), "it is the matrix, the indispensable condition, of nearly every other form of freedom". If sacrificed, "neither liberty nor justice would exist". *Palko* v. *Connecticut,* 302 U. S. 319, 326-327.

Vital Importance of Further Jurisdictional Questions.

The District Courts sitting in bankruptcy are courts of limited jurisdiction (*Chicot - County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371, 376), but their functions are such that the scope of their jurisdiction must always be matter of general public interest,—**herein matter of special nation-wide concern in that herein the misclaimed jurisdiction is utilized to deny your petitioner and associates freedom of speech.**

Prejudicial Inconsistencies and Unwarranted Findings and Statements of the Lower Courts.

The findings, orders, opinions and decisions herein of the District Court and of the Circuit Court of Appeals are a jungle of prejudicial, unfounded and inconsistent findings and rulings, together expressive of the penchant of the bankruptcy courts for restraining future communications between mutually interested parties,—"child and tool", says the Chicago Civil Liberties Committee (Their Motion, p. 3), of our bankruptcy courts. Small wonder, to paraphrase Captain Edward V. Rickenbacker, that freedom of speech is diminishing,—"smeared" to death by misleading and libelous statements of its enemies.

(1) The highly prejudicial statement of the Circuit Court of Appeals on the second appeal (*In re 4145 Broadway Hotel Company*, 117 Fed. 2nd. 639, 1st col.) that the trial court entered the injunction of May 26, 1938 (to quote),

> "Because it appeared to the court that the charges [by Thomas] were made for the purpose of compelling the trustees to enter into a lease with his client so that he could obtain commissions thereon, * * *"

is untrue.

This statement of the Court of Appeals flatly contradicts the order of May 26, 1938, which itself recites the reasons for the entry of the order and recites nothing of the kind (Trans. 7497, pp. 10-11). It is conclusively negatived by the record of the proceedings of May 23, 1938 (Trans. 6696, pp. 62-67; reprinted Appendix, Our Orig. Br. 73-79). It is based wholly upon unsupported charge by respondents, on mere information and belief (Respondents' petition of May 5, 1938, Trans. 6696, p. 3, 2nd par.), denied under oath by your petitioner (Reply of May 16, 1938, Trans. 6696, p. 9, par. numbered 5, copied into the

preliminary restraining order of May 5, 1938, which itself prefaces its recital with **"it appearing from said petition"**.

(2) The prejudicial statement of the Circuit Court of Appeals on the second appeal (*In re 4145 Broadway Hotel Company,* 117 Fed. 2nd. 639, 641) that it found "ample evidence in the record" to sustain the charge by respondents that petitioner obtained his powers of attorney by "misrepresentation" **is untrue.**

See our original brief, pages 30-31, and our petition for rehearing herein in the Court of Appeals (R. 87, par. 1).

(3) The statement of the Circuit Court of Appeals on the second appeal (117 Fed. 2nd. 639, 2nd. col.) that by the District Court's decretal order of August 6, 1940, the injunction of May 26, 1938, was "continued in effect" is **untrue.**

In the decretal order of August 6, 1940 (Finding, Trans. 7497, p. 61, par. numbered 9), the District Court did not decree but **merely erroneously held** that the injunction of May 26, 1938, "has been ever since said date and remains at the date hereof in full force and effect".

(4) That the finding of the Circuit Court of Appeals on the first appeal (100 Fed. 2nd. 7, 9 par. 5) that petitioner was not coerced to consent to be enjoined pending the possible contemplated appeal **is untrue** is established beyond room for dispute by the record herein (Proceedings of May 23, 1938, Trans. 6696, pp. 62-67; reprinted, Appendix to Our Orig. Br. 73-79).

(5) On the first appeal (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7, 8-9) in order to demonstrate that the injunction was not a permanent injunction and therefore, as appellant Thomas claimed, beyond the jurisdiction of the District Court, the Circuit Court of Appeals resorted to and relied upon the record *aliunde* the face of the injunction itself, to wit, the proceedings of May 23, 1938 (Appendix, Our Orig. Br. 73-79); accordingly held (Op. 8, 2nd. col.) that the injunction restrained your petitioner "until the disposal of the contemplated appeal from his [the District Court's] order denying permission to file the second amended petition"; and pointedly concluded (Op. 10),

> "We conclude that we cannot disturb the injunctive order complained of, but in so holding we are not passing upon the right of the appellant, or any other certificate holder, to take any proper action in the future which is authorized by the terms of the trust agreement."

On the second appeal (*In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd. 639, 641, par. 1) the Circuit Court of Appeals held that the injunction was not of the nature or limited as held on the first appeal, **on the sole ground,** to quote the court, that

> "We find no such limitation **in the order.**"

(6) *Per Curiam,* April 27, 1938 (130 Fed. 2nd. 487, 488), the Court of Appeals stated that when the injunction should be dissolved was

> "within the discretion of the District Court".

No authority for ignoring the record *aliunde* the face of the order of injunction (Compare our Orig. Br. 45, 1st par. and authorities cited) and holding that the face of the order controlled, or for the ruling that the injunction remained in effect after midnight, June 22, 1938 (Compare, *Sweeney* v. *Hanley,* 126 Fed. 97, 99; cert. den. 183 U. S. 700), and until dissolved "in the discretion of the District Court" has ever been cited by court or by counsel in the whole course of this litigation.

Witting or unwitting, such misstatements of fact and triflings with established rules of law serve like ends as Hitler's hate-stirring denunciations of other races.— Eternal vigilance is the price to all of us of immunity from influence by such tactics.

Jurisdiction of the Bankruptcy Courts under Section 207 Par. (f).

The real, really the only issue as to the jurisdiction of the Bankruptcy Courts as such is as to their jurisdiction under Section 207, 11 U. S. C. A., Par. (f).

(1) What the Circuit Court of Appeals has to say (Opinion, R. 70) about reservations in the order of confirmation of the plan of reorganization is mere stop-gap.

Question of consistency or inconsistency of the so-called "reservations" with the plan of reorganization and the Bankruptcy Act was first raised in the instant case (See, Our Orig. Brief, 24-26, 57-58), and was never discussed or alluded to in any opinion of the Court of Appeals prior to its opinion of July 18, 1942 (R. 68-71). Respondents themselves have never ventured any discussion of that issue. And all that the Court of Appeals has to say on the subject in its last opinion (R. 70) is,

> "As our former opinions disclose, the proposed plan of reorganization and the reservations contained in the court jurisdiction to enter **the injunction order.**"

To enter what injunction? Why, **the injunction order as construed on the first appeal** (100 Fed. 2nd. 7).

And the Court of Appeals did not hold on the first appeal that the District Court had jurisdiction to entertain petitioner's proposed second amended petition, but only that it had "jurisdiction to entertain appellant's motion for leave to file the amended petition". *In re 4145 Broadway Hotel Co.,* 100 Fed. 2nd. 7, 9. Then, on the ground that the recited consent was a real not a coerced consent, the court held that the only question was of the jurisdiction of the District Court **so** to enjoin petitioner. Thus the court avoided question whether entry of the injunction was an abuse of discretion because the District Court, as the District Court itself held by its order of May 23, 1938 (Trans. 6696, p. 57), did not have jurisdiction to entertain the second amended petition itself. See, *U. S. et al.* v. *Corrick et al.,* 298 U. S. 435, 437-438, 8 L. ed. 1263, 1266.

(2) What the Court of Appeals has to say (Op. R. 70) of powers of the bankruptcy courts under Section 207, paragraph (f) is of like ilk, only more so; for, whatever such powers be they are conditioned on acceptance by creditors and none of the so-called reservations were ever submitted to creditors.

(3) Thus it is that the Court of Appeals is driven to read "put into effect and carry out the plan" of paragraph (h) of Section 207 as "to **operate * * * the property** dealt with by the plan"!

The Court of Appeasl expressly rests its decision on this construction of paragraph (h), declaring that the clear import of the injunction was to prevent interference "with the **operation** * * * of the plan as confirmed" (Opinion, R. 70, last 7 lines).

We are not unmindful that this Court reviews decisions not opinions, but it is significant that the Court of Appeals' major premise for its decision herein is this important and revolutionary construction of the Bankruptcy Act, and in respects never before passed upon by this Honorable Court.

And do not persistent inexcusable misstatements of fact, repeated patently erroneous rulings of law, without color of authority and arrived at by ignoring abundant contrary decisions, and resultant Dreyfussian injustice to the litigant at sacrifice of his constitutional rights amount to departures (Rule 38, par. 5b) "from the accepted and usual course of judicial proceedings", or to sanction of "such a departure by a lower court"? If not, it must be because denial to a litigant of *bona fide* hearing and judgment on his cause, is not such a departure.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.

I the undersigned Lloyd C. Whitman hereby certify that the above petition for rehearing of petitioner F. Gerald Thomas, and related motions the matter presented in support thereof are presented in good faith and not for delay.

LLOYD C. WHITMAN,
Counsel for Petitioner.

State of Illinois,
County of Cook—ss.

F. Gerald Thomas, affiant, being first duly sworn, says that under date February 26, 1943, the respondent trustees herein instituted referendum by mail as of May 1, 1943, under and pursuant to the provisions of the reorganization trust agreement touching the capital stock of 4145 Broadway Hotel Company, a corporation, to determine by vote of stockholders whether the trust created by said trust agreement shall be terminated as of May 1, 1943, or continued until May 1, 1945; that said referendum is now going on and in that connection said trustees are circularizing stockholders by mail.

F. GERALD THOMAS,
Affiant.

Subscribed and sworn to before me
in my County this 9th day of March,
1943.

Catherine Dee,
Notary Public in and for
Cook County, Illinois.